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Supreme Court of the United States

No. 50—October Term, 1963

MORRIS GOTTHILF,

Petitioner,

against

BENJAMIN SILLS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST JUDICIAL DEPARTMENT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF THE DISMISSAL OF THE WRIT AS IMPROVIDENTLY GRANTED, OR THE AFFIRMANCE OF THE DETERMINATION UNDER REVIEW.

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Comes now the Attorney General of the State of New York and asks leave of the Court to file this brief as *Amicus Curiae*.

The decision under review is reported in 17 A. D. 2d 723 (R. 46). It affirmed an order of the Supreme Court, New York County, granting the judgment plaintiffs' application for the issuance of a body execution (N. Y. Civil Practice Act, § 764) against the individual defendant, the present petitioner.

A motion for leave to appeal to the Court of Appeals of New York was dismissed for want of jurisdiction in the

Court to entertain it. Jurisdiction was declined because "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution" (R. 47; reported 12 N. Y. 2d 761).

An appeal to the Court of Appeals thereafter taken as of right upon the ground that the constitutional rights of the appellant were directly involved was dismissed upon the same ground as the prior order of that Court dismissing the motion for leave to appeal (R. 48; reported 12 N. Y. 2d 792), *viz.*, the order was not a final determination of the action. It was the *judgment* which finally determined the action, not the order for body execution.

POINT I

Given the non-final character under New York Law of the order brought before this Court for review, the petitioner has failed to exhaust the remedies available to him under State Law.

(1)

New York Civil Practice Act, § 589, subdivisions 1 and 4 read, so far as relevant, as follows:

> "§ 589. *Appeal by permission. Appeal to the court of appeals by permission lies only*
>
> 1. by permission of the appellate division, and not otherwise,
>
> (a) from a judgment or order of the appellate division which does not finally determine the action or special proceeding in which it is entered, and
>
> (b) from a judgment or order of the appellate division in an action or a special proceeding which was originally commenced in a court other than the supreme court, a county court, a surrogate's court, or the court of claims, unless the construction of the

constitution of the state or of the United States is directly involved; and

* * *

4. (a) The appeals authorized by this section shall be allowed upon questions of law when required in the interest of substantial justice; and the appellate division, when it allows such an appeal, shall certify that questions of law have arisen which in its opinion ought to be reviewed by the court of appeals.

(b) In its order allowing an appeal from a judgment or order which does not finally determine an action or special proceeding the appellate division shall certify the questions of law decisive of the correctness of its determination or of any separable portion thereof; and the determination shall then be reviewable in the court of appeals in the manner prescribed in sections six hundred and three and six hundred and six of this act. The court of appeals shall certify to the appellate division its answers to the questions certified and shall direct the entry of the appropriate order or judgment."

The clause in subd. 1(b), beginning with the word "unless" does not impair the force and pertinence of our submission that the instant writ was improvidently granted. The purpose of the clause was to make it clear that all cases directly involving the State or the federal constitution were appealable without the prior permission of the Appellate Division—such permission having formerly been required if the litigation had originated in one of the lower courts. The quoted statute (as amended by L. 1954, ch. 346) was thus brought in line with the liberalizing amendment to the State Constitution adopted in 1944 (Art. VI, § 7). The Judicial Conference so stated in proposing the 1954 amendatory statute. See their Twentieth Report (1954), pp. 79-80. And see Cohen & Karger, *Powers of the New York Court of Appeals* (1952), p. 246.

But the 1944 constitutional amendments left unaltered the requirement in Art. VI, § 7, subd. (4) that appeals from non-final orders could only be taken to the Court of Appeals by leave of the Appellate Division, upon a question or questions certified. The section was merely renumbered, and the crucial words are now in Art. VI, § 3, subd. (4).

It is clear upon the Transcript of Record filed in this Court that the petitioner has at no time applied to the Appellate Division for leave to appeal upon a certified question or questions.

Generally speaking, it is the custom of the Appellate Division to certify questions in cases where the interlocutory posture of the case prevents an important constitutional question from being brought before the Court of Appeals.

An example is *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938). This action, to challenge the constitutionality of one of the emergency, excise tax, local laws passed by the City in 1934 and amended in 1935, was begun by an action in the Supreme Court, New York County, for money had and received, *i.e.*, sums paid under protest pursuant to the requirement of a tax law challenged as unconstitutional. The law was stricken down as unconstitutional in the Court of first instance, and in consequence an order was entered denying the City's motion to dismiss the complaint. This is *par excellence* an example of a non-final order. The Appellate Division affirmed. 251 App. Div. 710. The order left the case still not appealable as of right to the Court of Appeals. The City moved under the quoted sections of the Civil Practice Act for leave to appeal on a certified question, and the motion was granted. See 251 App. Div. 798, where the Court said:

"Motion for leave to appeal to the Court of Appeals granted; question certified."

The language of the certified question was:

"Does the complaint herein state facts sufficient to constitute a cause of action?"

The cause came on to be heard in the Court of Appeals, which handed down an Opinion reversing the lower Courts and dismissing the complaints (there were two plaintiffs) with costs. 275 N. Y. 258. The plaintiffs, faced now with final orders, and judgments on remittitur entered pursuant to them, appealed to this Court. Probable jurisdiction was noted, and after argument and due deliberation the judgments were affirmed. 303 U. S. 573.

If the present petitioner had pursued this course, and persuaded the Appellate Division to certify a question, he might well have prevailed in the Court of Appeals.

There are ample precedents for dismissing a writ of certiorari once granted if, upon the argument, it appears that State remedies have not been exhausted. See *Gorman* v. *Washington University*, 316 U. S. 98 (1942).

POINT II

The limitation upon this Court's power of review to the review of final orders should be adhered to upon the facts of this case. The departure from the rule sanctioned in criminal appeals (*e.g.*, *Griffin* v. *Illinois*, 351 U. S. 12) should not be extended to cases where the issues do not touch the merits of the controversy.

(1)

That orders, which were entered after the controversy had been adjudicated on the merits and which relate only

to the enforcement of an antecedent final judgment, are not final orders within the jurisdiction of the Court of Appeals of New York, is a principle thoroughly established in the jurisprudence of that Court.

In *Knickerbocker Trust Co.* v. *Oneonta, etc., Ry. Co.*, 197 N. Y. 391 (1910), a railroad had been sold upon the foreclosure of a mortgage upon it. The purchaser defaulted, and a new sale was made. It was held that a decision of the Appellate Division refusing to order the previous purchaser, who had defaulted, to join in a deed to the new purchaser was not appealable to the Court of Appeals, since it was not a final order. The Court said (p. 393):

> "Such an application on the foot of the decree would be a proceeding incidental and auxiliary to the judgment itself, and the order made in response thereto would simply be a direction made by the court for the purpose of carrying out and enforcing rights already settled and determined by and under the judgment. The proceeding would not be one addressed to the prosecution of any new or independent rights, but would simply call on the court to enforce those already adjudicated. (*Merriam* v. *Wood & Parker Lith. Co.*, 155 N. Y. 136, 139; *Jewelers' Merc. Agency* v. *Rothschild*, 155 N. Y. 255; *People* v. *Amer. Loan & Trust Co.*, 150 N. Y. 117, 123, 124.)"

The principle of the case just cited was summed up in concise language in *Rudiger* v. *Coleman*, 206 N. Y. 412 (1912), where the Court held it had no jurisdiction of an appeal from an order which was "one made in the action on an application incidental and auxiliary to the judgment and for the purpose of regulating, carrying out and enforcing rights already settled and determined by and under the judgment * * *" (p. 415).

The principle has been applied to a case where the Appellate Division vacated an order for civil arrest. *Matter of Patino* v. *Patino*, 307 N. Y. 910 (1954

In a case involving an order for body execution, the Court dismissed the appeal but took pains to admonish the appellant that the Court would entertain the appeal if an application were made to the Appellate Division to certify a question. *Chase Watch Corp.* v. *Heins*, 283 N. Y. 564 (1940). That is precisely the procedure which we suggested in Point I, *supra*, should have been followed here.

(2)

The provisions of 28 U. S. C. § 1257 limit the power of this Court, in reviewing decisions of State courts of last resort, to the review of final orders. An exception was made in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), because the denial by the Supreme Court of Illinois of leave to prosecute an appeal in a felony case *in forma pauperis* meant, in substance, that equal justice was not provided for rich and poor alike (p. 16), resulting in a denial of the equal protection of the law. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color" (p. 17).

It is manifest from the facts of the instant case that that is not the situation here.

For cases where this Court has insisted that the decision of a State Court, not to be reviewed by certiorari or appeal, shall be final, see *Bruce* v. *Tobin*, 245 U. S. 18 (1917); *Bacon & Sons, Inc.* v. *Martin*, 302 U. S. 642 (1937); *Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 (1948); *Montgomery Building & Construction Trades Council* v. *Ledbetter*, 344 U. S. 178 (1952). For a statement of general principles where the review is of a United States Court of Appeals, see *DiBella* v. *United States*, 369 U. S. 121, 125-126 (1962).

POINT III

New York Civil Practice Act, § 764, in allowing a body execution against one who has failed to comply with a judgment for the payment on money does not contravene either the Eighth or the Fourteenth Amendment.

New York Civil Practice Act, § 826 provides:

> "§ 826. *Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article, where the action is brought for either of the following causes:
>
> * * *
>
> 5. To recover damages for fraud, or deceit."

Civil Practice Act § 764 provides that "an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor in a case * * * where the plaintiff's right to arrest the defendant depends upon the nature of the action"—an implicit cross-reference to § 826, *supra*.

Body execution for failure to pay a judgment premised upon fraud or deceit on defendant's part is not an isolated statutory phenomenon peculiar to New York State. Twenty-five States authorize body execution under these circumstances. For a list of them, we beg leave to refer the Court to *Index-Digest of State Constitutions*, 2nd Ed., p. 531 (compiled by Legislative Drafting Research Fund of Columbia University, 1959).

Where such provisions of law have been challenged as violative of the federal constitution, they appear to have been uniformly upheld, upon the principle, stated *obiter* to be sure, in *Matter of Reeves* v. *Crownshield*, 274 N. Y. 74, 79 (1937):

> "Without this right, there would be no power in the court to enforce its order. To compel the judgment debtor to obey the order of the court is not imprisonment for debt, but only imprisonment for disobedience of an order with which he is able to comply."

In *Tatlow* v. *Bacon*, 101 Kan. 26, 165 Pac. 835 (1917), the Court in upholding a statute providing for execution against the person challenged as contravening various portions of the Federal Constitution (especially the Eighth Amendment), the Court said (p. 30):

> "It is insisted by the defendant that the statute is bad for the reasons stated and also because it imposes cruel and unusual punishment. It has been held in many cases that such statutes are not violative of the provision prohibiting deprivation of liberty without due process of law or the one forbidding cruel and unusual punishment. *Light* v. *Canadian County Bank*, 2 Okla. 543, 37 Pac. 1075; 5 C. J. 438."

In *Harrison* v. *Caudle*, 141 S. C. 407, 139 S. E. 842 (1927), a body execution statute was upheld against a contention that it deprived the debtor of the equal protection of the laws, in that it exempted women.

In *Lipman* v. *Goebel*, 357 Ill. 315, 192 N. E. 263 (1934), the Court said (p. 319):

> "While any judgment for money, in its more comprehensive meaning, may be classified as a debt in the sense that the judgment debtor is indebted to the judgment creditor, yet the instant case does not involve a debt within section 12 of article 2 of the State constitution. That section does not relate to debts within the meaning of judgments recovered in tort actions but relates to judgments arising out of contracts, either express or implied. It particularly has no application to judgments recovered for malicious, wanton and willful tortious acts committed by the judgment debtor. *People* v. *Walker*, 286 Ill. 541; *Kennedy* v. *People*, 122

id. 649; *Kitson* v. *Farwell*, 132 *id.* 327; *Buck* v. *Alex*, 350 *id.* 167."

The petitioner, it is submitted, places an excessive and unwarranted reliance upon cases in the field of criminal law. Civil arrest is basically a device to punish "an offence against the court and against the administration of justice * * *". *Eilenbacker* v. *District Court of Plymouth County*, 134 U. S. 31, 39 (1890), a case whose authority has not been impugned over the years. See, *e.g.*, *Fisher* v. *Pace*, 336 U. S. 155, 159 (1949); *Green* v. *United States*, 356 U. S. 165, 183 (1958).

CONCLUSION

The writ should be dismissed as improvidently granted; or, in the alternative, the order under review should be affirmed.

Dated: September 11, 1963.

Respectfully submitted,

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